A Trial Counsel's Guide for Article 13 Motions: Making Your Best Case

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Introduction

You are the trial counsel for an active-duty infantry brigade, about to try a drug distribution and aggravated assault case. The accused is pleading guilty. The pretrial agreement and stipulation of fact are ready. Your sentencing witnesses are present and prepared. You are ready to go. Then, near the end of the pretrial Rule for Court-Martial (RCM) 802[1] session, minutes before you are to go into court, the defense counsel announces that she intends to move for appropriate relief under Article 13, Uniform Code of Military Justice (UCMJ).[2]

She states that the accused's unit made him hobble across the company area, before trial, wearing hand-irons and shackles in front of his entire company. The company was practicing for a change of command ceremony. When the accused and his escort were about fifty meters to the left of the company formation, the commander ran up and quickly spoke to the first sergeant. The first sergeant then ordered the company to execute a left face and parade rest. He then stated to the company in a loud voice, "You all see that . . . that's what happens to drug dealers and scum in this company." The first sergeant then spat on the ground, ordered a right face, and continued the change of command rehearsal.

The defense counsel claims that the unit's actions violated Article 13, and that her client is entitled to substantial sentence credit. She intends to put the accused on the stand to testify about the incident, as well as other soldiers who witnessed the unit's actions. The military judge, with a distinctly unhappy expression on his face, turns to you and says, "Well, trial counsel, how do you intend to handle this?"

Article 13 motions are a regular procedure for defense counsel seeking sentence relief for real or perceived penalties imposed on their clients by the chain of command before trial.[3] This note reviews the standards for relief and waiver of Article 13 violations, and discusses how trial counsel and the chain of command can work together to present a persuasive defense against a claim of unlawful pretrial punishment.

Article 13 Standard

Motions for Relief

Article 13, UCMJ, prohibits the imposition of punishment or penalty on an accused before trial, as well as pretrial arrest or confinement conditions more rigorous than required to ensure the accused's presence at trial.[4] Motions for appropriate relief under Article 13 generally fall into two categories: (1) those in which the accused claims he was punished by conditions of confinement or arrest more rigorous than necessary;[5] and (2) those in which the accused claims that some other unit or chain of command action punished or penalized him before trial.[6] Courts routinely award administrative and judicial sentence credit as relief for violations of Article 13.[7]

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1. MANUAL FOR COURTS-MARTIAL, R.C.M. 802 (2000) [hereinafter MCM].

2. UCMJ art. 13 (2000).

3. *See, e.g.*, United States v. Fulton, 55 M.J. 88, 89 n.1 (2001) (accused was repeatedly required to refer to himself as "prisoner bitch" and "prisoner jackass," questioned about his sexual orientation, ordered to perform a strip tease routine in front of other guards and prisoners, and ordered to do other similar acts which constituted unlawful punishment); United States v. Stringer, 55 M.J. 92 (2001) (accused was read his rights by his commander in front of his unit, handcuffed in front of the unit, and subjected to ridicule by his drill sergeants).

4. UCMJ art. 13. Article 13 states:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Id.

5. *See, e.g.*, United States v. Quintero, 54 M.J. 562 (Army Ct. Crim. App. 2000) (appellant, a noncommissioned officer, claimed violation of Article 13 when confinement facility authorities required him to work on details with enlisted men while he was in pretrial confinement).

6. *See, e.g.*, United States v. Starr, 53 M.J. 380 (2000) (appellant claimed violation of Article 13 when assigned different duties than his normal occupational specialty and ordered him to surrender special headgear for extended period before trial).

Whether the court is dealing with a "more rigorous" or a "punishment-or-penalty" type Article 13 motion, the factors the court will consider in determining whether an accused has suffered pretrial punishment are similar. These factors, which are meant to assist the military judge, are:

> (1) What similarities, if any, in daily routine, work assignments, clothing attire, and other restraints and control conditions exist between sentenced persons and those awaiting disciplinary disposition;
>
> (2) What relevance to customary and traditional military command and control measures can be established by the government for such measures;
>
> (3) Are the requirements and procedures primarily related to command and control needs, or do they reflect a primary purpose of stigmatizing [the accused]; and
>
> (4) Was there an "intent to punish or stigmatize [the accused]."[8]

The lines between these factors are often blurred, and the weight given to each particular factor varies on a case-by-case basis. In some cases, the court may view seemingly innocuous, well-intentioned unit actions as pretrial punishment.[9] In other cases, however, the court may find that severe limitations on an accused's liberty are justified.[10] Because most accused soldiers do not spend time in pretrial confinement, trial counsel more frequently face punishment-or-penalty type Article 13 motions. Accordingly, after a brief discussion of waiver, this note focuses on responding to this type of motion.

Waiver and Article 13

Most motions or objections are considered waived if not raised in a timely manner at trial.[11] Unless affirmatively waived,[12] however, an accused may make a motion for relief based on a violation of Article 13 at any time, even on appeal.[13] Appellate courts may consider evidence not contained in the record of trial to determine whether an accused suffered pretrial punishment.[14] Therefore, even if the accused does not request relief, the trial court should address pretrial punishment of the accused, obtaining an affirmative waiver of Article 13 issues if the accused does not seek such relief.

Trial counsel have a role in this process. In guilty plea cases, trial counsel should ensure that the pretrial agreement contains a specific waiver of Article 13 issues. In other cases, trial counsel should remain alert and ensure that the military judge discusses a waiver of all Article 13 issues before the accused enters his plea[15] or at some other time during trial.[16]

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7. *See* United States v. Fulton, 55 M.J. 88, 89 (2001) (concurring with the lower service appellate court that a military judge has the power to dismiss charges because of illegal pretrial punishment); United States v. Stringer, 55 M.J. 92, 94 (2001) (discussing the broad powers of the military judge to grant administrative credit for illegal pretrial punishment, but declining to address whether the military judge had authority to order the convening authority to publish an article in the post newspaper regarding the propriety of the command's conduct). *See generally* Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, Army Law., Aug. 1999, at 1 (administrative credit is applied against the approved sentence to confinement; judicial credit is applied against the adjudged sentence, reducing the sentence at trial).

8. United States v. Smith, 53 M.J. 168, 172 (2000) (quoting Francis A. Gilligan & Fredric I. Lederer, Court-Martial Procedure § 4-90.00, at 136-37 (2d ed. 1999)). *See also Quintero*, 54 M.J. at 567 (applying the four factors announced in *Smith* and finding no basis for the accused's claim of unlawful pretrial punishment).

9. *See, e.g.*, United States v. Francis, 54 M.J. 636, 641 n.2 (Army Ct. Crim. App. 2000) (trial judge found a violation of Article 13 when a platoon leader told members of his platoon that the "accused had come up hot on a urinalysis, was going to get court-martialed and go to jail, and that they needed to stay away from him as any association would be bad for them").

10. *See, e.g.*, United States v. Sittingbear, 54 M.J. 737 (N-M. Ct. Crim. App. 2001) (court concluded that accused's placement in maximum custody with only limited time out of his cell for over six months before trial was not pretrial punishment because measures were related to legitimate government objectives).

11. *See* MCM, *supra* note 1, R.C.M. 905(e).

12. *See* United States v. Huffman, 40 M.J. 225, 227 (C.M.A. 1994).

13. *See* United States v. Scalarone, 54 M.J. 114, 117 (2000) (affirming Court of Criminal Appeals decision to grant eighty-seven days sentence credit to soldier whose conditions of pretrial confinement were more rigorous than necessary even though accused did not raise issue at trial; accused presented affidavits in support of his claim before the lower appellate court); *Huffman*, 40 M.J. 225.

14. *See, e.g.*, *Scalarone*, 54 M.J. at 115.

15. *See* U.S. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook para. 2-1-3 (1 Apr. 2001).

16. *See Scalarone*, 54 M.J. at 118 (Cox, J., concurring).

Responding to Article 13 Motions

Receiving the Motion

Article 13 motions should be made before pleas are entered. The defense carries the burden by a preponderance of the evidence.[17] Often, the only evidence the defense presents is the testimony of the accused. This testimony can be vague and unfocused, and may be unsupported by any documents or physical evidence. The defense may raise the motion before arraignment, but, for tactical reasons, may defer it until sentencing.[18] Sometimes, as in the introductory fact pattern to this note, the trial counsel is unaware that the accused intends to raise Article 13 issues until a few minutes before trial. Nonetheless, if the accused can articulate any kind of action that the military judge could consider as pretrial punishment, the trial counsel will need to respond.

Form of the Motion

The trial counsel should ask the military judge to make the defense put its Article 13 motion in writing.[19] Responding to a written motion is much easier than responding to one made orally. With a written motion, the defense must narrow the focus of their request. This enables trial counsel to respond more effectively to the allegations raised by the defense. More importantly, a written motion gives the military judge a better perspective on the merits of the motion.

Time to Respond

The trial counsel may need to ask the military judge for a continuance to discuss the motion with the chain of command and prepare a response.[20] The amount of time the military judge gives is usually proportional to the amount of notice the defense gave to the trial counsel. If the trial counsel first hears of the motion in court, the military judge may grant a generous continuance. If, however, the trial counsel knew or should have known that the defense would make an Article 13 motion, the military judge will probably not give the trial counsel much time to respond. Regardless, whatever the circumstances, the trial counsel must gather facts and prepare any necessary witnesses.[21]

Gathering Facts

Ideally, the defense has given the trial counsel a written motion outlining the facts and arguments offered in support of the motion. If not, the trial counsel should have notes on the defense's oral motion, including testimony and arguments from court.[22] Armed with this information, the trial counsel must immediately meet with the chain of command and anyone else involved, including relevant defense witnesses, to "get their side of the story." Trial counsel should check each "fact" for accuracy to find out what really happened and to develop a list of witnesses to testify on disputed issues. The trial counsel must gather the facts in light of the purpose behind each pretrial condition or measure placed on the accused. In particular, the trial counsel needs to focus on whether the unit action was a relevant customary control measure, or whether the action reflected an intent to stigmatize or otherwise punish the accused.[23] The trial counsel must also gather any relevant documents (for example, conditions on liberty orders, charge of quarters logs, witness notes, counseling statements, and hand-receipts) and review them.

Witness Preparation

Preparing the chain of command to testify for an Article 13 motion can be difficult. It is an uncomfortable situation for them; the defense has accused them of treating one of their own soldiers poorly. They often become defensive, and may be irritated at the accused and the witnesses who testified about the alleged poor treatment. They will probably feel rushed, and may be irritated at the trial counsel, too.

Despite these distractions, the trial counsel and the chain of command must focus on the two issues at hand: the military control function of their action, and the reasons why it was not intended to stigmatize or punish the accused.[24] Trial counsel must go over the facts with the witnesses. Leaders sometimes do things without thinking of the underlying purpose, if any.

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17. *See* MCM, *supra* note 1, R.C.M. 905(c)(1).

18. *See id.* R.C.M. 905(d).

19. *See id.* R.C.M. 905(a).

20. *See id.* R.C.M. 906(b)(1) discussion.

21. *Id*.

22. Trial counsel could also ask the court reporter for a transcript or tape recording of the Article 39(a) session in which the defense counsel and accused presented the motion.

23. United States v. Smith, 53 M.J. 168, 172 (2000).

24. *Id*.

"That's the way we always do it," or "That's our SOP" are common answers from company-level leaders. In most cases, however, when given an opportunity to review their actions, the chain of command can articulate a legitimate reason for every action they took involving an accused. Getting this information across clearly to the judge is simply a matter of good witness preparation before they take the stand.

Testimony

The trial counsel should ask the chain of command witnesses simple, non-leading questions, such as: What did you do? What order did you give? Why did you do that? The witness should be the focus of the questions. If the witness understands why he is testifying, these simple questions allow him to explain what happened in his own words. The witness will also be better prepared for cross-examination. The trial counsel should advise the witnesses to remain even-tempered and professional, and address all answers to the military judge. They should be calm and respectful to the court, counsel, and the accused. They should admit any mistakes they made, but be firm about their motives. Such a presentation will help legitimize the chain of command's actions in the military judge's mind.

Arguing the Motion

The trial counsel should make his argument short and concise, addressing the relevant issues and debunking the defense counsel's points. The trial counsel may not have time to script the argument for an Article 13 motion, but if he can, he should not merely read it to the judge. A checklist or outline may be a better tool to help the trial counsel cover the necessary points.

Conclusion

A judge reviewing this note's introductory fact pattern would have little trouble finding a violation of Article 13. A judge might find that having an accused walk from point A to point B in hand irons and shackles was a relevant military control measure; however, most judges would likely find that walking the accused past the entire company, and then maneuvering the unit for a better look at the accused in irons, reflect a clear intent to stigmatize the accused. Such actions are inappropriate and demonstrate a training deficiency on the part of the chain of command. An accused subjected to such treatment would almost certainly receive some sentence credit.[25]

Trial counsel should be relieved that Article 13 motions are not a part of every case. Dealing with these motions is time consuming and requires a significant amount of effort better spent preparing for the actual trial. Using some of the techniques described in this note can help trial counsel make their best case, minimizing wasted time and effort, the next time they face an Article 13 motion.

A Preference for Native-American Contractors

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Introduction

Commercial activities studies, also known as competitive sourcing or "A-76"[27] competitions, can be expensive and can take years to complete. Furthermore, they can be disruptive to mission and morale. So one day, you are sitting in a meeting with some installation people, and somebody comes in and says a law allows us to skip all that, as long as we contract with a Native-American firm. Is it really that easy? What is this all about? The U.S. District Court for the District of Columbia has addressed this issue.[28]

Facts

In *American Federation of Government Employees v. United States*,[29] the controversy arose from source selections for civil engineering and maintenance work at both Kirtland Air Force Base in Albuquerque, New Mexico, and MacDill Air Force Base in Tampa, Florida. Pursuant to 10 U.S.C. § 2461 and *Office of Management and Budget Circular A-76, Performance*

25. Relief for pretrial punishment may also include dismissal of charges. *See, e.g.*, United States v. Fulton, 55 M.J. 88 (2001) (holding that the military judge has the authority to dismiss charges as a remedy for unlawful pretrial punishment).

26. Major White co-authored this note while assigned as Professor, Contract and Fiscal Law, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

27. Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities (Aug. 4, 1983, Revised 1999).

28. Am. Fed'n of Gov't Employees v. United States, 104 F. Supp. 2d 58 (D.D.C. 2000); *see also* Am. Fed'n of Gov't Employees v. United States, 195 F. Supp. 2d 4 (D.D.C. 2002).

29. 104 F. Supp. 2d at 58.

of Commercial Activities, the Air Force initiated cost studies to determine whether it would be cost-efficient to contract out the base maintenance work that Department of Defense (DOD) employees were performing at those two bases.[30]

The basic steps of the A-76 study were as follows: (1) develop a performance work statement; (2) develop a management study that shows the government's Most Efficient Organization (MEO); (3) develop an in-house (that is, using government employees) cost estimate; (4) solicit bids/offers from private contractors; (5) compare the in-house cost estimate to the selected private contractor's bid/offer; and (6) the administrative appeals process.[31]

Early in Kirtland's A-76 process, the Air Force decided to forego the normal A-76 process and instead award the civil-engineering contracts to private firms owned by Native Americans.[32] The authority for that action was Section 8014 of the Department of Defense Appropriations Act, 2000, which permitted conversion of a function, without cost comparison, from performance by DOD employees to performance by a contractor with at least fifty-one percent Native-American ownership.[33] After reviewing the capability statements from three Native-American owned firms, the Air Force selected Chugach Alaska Corporation.[34]

The plaintiff union and the individual-employee plaintiffs first sought to enjoin the defendants, the United States and the Secretary of the Air Force,[35] from using the Section 8014 preference for Native-American-owned firms. The court denied the plaintiffs' application for a preliminary injunction.[36]

The next phase of litigation involved cross-motions for summary judgment on the issue of the constitutionality of Section 8014(3).[37] The court granted the defendants' motion, denying the plaintiffs' motion.[38]

Discussion

On the preliminary issue of standing to sue, the court concluded that the individual-employee plaintiffs had standing to challenge the action at Kirtland. The court found that the operation of Section 8014(3) "deprived the plaintiffs of the opportunity to compete," and was "directly traceable to the governmental conduct at issue, i.e., the Air Force's award of that civil engineering contract to Chugach."[39] Furthermore, the alleged injury was "likely to be redressed by a favorable decision" of the court,[40] thereby satisfying all three prongs of the individual standing test.[41] The court also concluded the American Federation of Government Employees (AFGE) met the organizational standing requirements.[42]

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30. *Id.* at 60-61.

31. *Id.* at 61.

32. *Id.*

33. Pub. L. No. 106-79, § 8014, 113 Stat. 1212, 1234 (enacted Oct. 25, 1999) [hereinafter 2000 DOD Appropriations Act]. Section 8014 states:

> None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of the enactment of this Act, is performed by more than 10 Department of Defense civilian employees until a most efficient and cost-effective organization analysis is completed on such activity or function and certification of the analysis is made to the Committees on Appropriations of the House of Representatives and the Senate: Provided, That this section and subsections (a), (b), and (c) of 10 U.S.C. 2461 shall not apply to a commercial or industrial type function of the Department of Defense that: (1) is included on the procurement list established pursuant to section 2 of the Act of June 25, 1938 (41 U.S.C. 47), popularly referred to as the Javits-Wagner-O'Day Act; (2) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or (3) is planned to be converted to performance by a qualified firm under 51 percent Native American ownership.

Id.

34. *Am. Fed'n of Gov't Employees*, 104 F. Supp. 2d at 62.

35. In addition to these two original defendants, Chugach Management Joint Venture and Chugach Management Services, Inc., intervened as defendants. *Id.* at 59.

36. *Id.* at 61. MacDill Air Force Base had also decided to use Section 8014(3) to convert civil engineering functions directly to Chugach Management Services (a subsidiary of Chugach Alaska Corporation), and the preliminary injunction request initially included these functions. The court found the named employees had no standing to challenge the actions at MacDill Air Force Base because they were not employees at MacDill, and dismissed the case as to MacDill. *Id.* at 66. Therefore, the court's holding only applied to the actions at Kirtland Air Force Base.

37. Am. Fed'n of Gov't Employees v. United States, 195 F. Supp. 2d 4 (D.D.C. 2002).

38. *Id.* at 7.

39. *Id.* at 14-15.

40. *Id.* at 15.

As with the preliminary injunction request, the plaintiffs asserted a violation of the equal protection component of the Fifth Amendment Due Process clause and argued the appropriate standard of review was strict scrutiny, as the Section 8014(3) preference was a racial classification. The defendants argued, and the court agreed, that rational basis was the appropriate standard because "Section 8014(3) encompasses a political, rather than race-based, classification."[43] The court further noted the constitutional power of the legislative arm to regulate commerce with Indian tribes, and highlighted the defendants' argument that Section 8014(3) furthers the government policies of Indian self-determination, the United States' trust responsibility to Native American tribes, and the promotion of Native American community self-sufficiency.[44] The court concluded that "no reasonable trier of fact could find that Section 8014(3) is not a reasonable method for fulfilling Congress' special responsibilities to Alaska Natives."[45] In fact, the court said, "[T]he preference is constitutional because it is a reasonable tool to further these enumerated goals."[46]

Congress continued the Section 8014 preference for Fiscal Year 2002.[47] Section 8014 is identical in Fiscal Years 2000 and 2002, except the 2002 version applies to Indian tribes, as defined in 25 U.S.C. § 450b(e), and Native-Hawaiian organizations, as defined in 15 U.S.C. § 637(a)(15), rather than "Native Americans."[48] Thus, the issue of the Section 8014 preference continues to present itself.

The facts of the AFGE case present an issue that the court did not address: the issue of competition. As a general rule, the DOD must procure its needs by the use of full and open competition to the maximum extent practicable.[49] Under certain circumstances, it is permissible to establish or maintain alternative sources by use of full and open competition after exclusion of sources.[50] In addition, there is authority for other than full and open competition.[51] Notably, Section 8014 does not provide any exceptions to the law and regulation on competition among the private-sector offerors.[52]

Section 8014 provides, essentially, that conversion to firms mostly owned by Native Americans (Fiscal Year 2000 version), or firms mostly owned by Indian tribes or Native-Hawaiian Organizations (Fiscal Year 2002 version), will be exempt from the application of two statutes. The first is the Section 8014 requirement to perform a most efficient and cost-effective organization analysis.[53] The second is 10 U.S.C. § 2461, which requires a cost comparison between the MEO (of government employees) and the selected private contractor.[54] In other

41. An individual must satisfy a three-prong test to establish standing. First, the individual must have suffered some injury in fact. *Id.* at 9 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)). Second, the injury must be fairly traceable to the governmental conduct alleged. *Id*. at 10 (citing Warth v. Seldin, 422 U.S. 490, 504 (1975)). Finally, a favorable decision of the court must be likely to redress the alleged injury. *Id.* (citing *Lujan*, 503 U.S. at 561).

42. *Id*. Organizations must meet a separate three-part test.

> Standing exists where the organization's members (1) would have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to its purpose, and, finally, (3) neither the claims asserted nor the relief requested requires the participation of each of the organization's individual members.

Id. (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)).

43. *Id*. at 18. The court noted case precedent that "specifically considered Native Americans as a political classification," observing "that Indians [are] not . . . a discrete racial group, but, rather . . . [are] members of quasi-sovereign tribal entities." *Id.* at 19-20 (citing Morton v. Mancari, 417 U.S. 535 (1974)).

44. *Id*. at 18.

45. *Id.* at 24. The court earlier discussed the Treaty of Cession with Russia, which noted that "uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes." *Id.* at 21. The court further cited the Alaska Natives Claims Settlement Act, which recognizes as a goal fostering self-determination and financial independence among the Alaska Natives. *Id.* at 22 n.9.

46. *Id*. at 24.

47. *See* Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8014, 115 Stat. 2230 (enacted Jan. 10, 2002) [hereinafter 2002 DOD Appropriations Act].

48. *Compare id. with* 2000 DOD Defense Appropriations Act, *supra* note 33, § 8014. The 2000 DOD Defense Appropriations Act did not define the term "Native Americans" for the purpose of Section 8014. *See* 2000 DOD Defense Appropriations Act, *supra* note 33, § 8014.

49. Competition in Contracting Act, 10 U.S.C. § 2304(a)(1) (2000); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. subpt. 6.1 (June 1997) [hereinafter FAR]. Under full and open competition, all responsible sources are permitted to compete for the procurement.

50. *See* 10 U.S.C. § 2304(b); FAR, *supra* note 49, subpt. 6.2; U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. subpt. 206.2 (Apr. 1, 1984) [hereinafter DFARS].

51. See 10 U.S.C. § 2304(c) (listing seven statutory exceptions that can justify other than full and open competition) *see also* FAR, *supra* note 49, subpt. 6.3; DFARS, *supra* note 50, subpt. 206.3.

52. 2002 Appropriations Act, *supra* note 47, § 8014.

words, Section 8014 exempts these conversions from the normal requirement to prove that the private contractor will be cheaper and more efficient than that government organization, but that is all it does. Section 8014 does nothing to the normal rule that competition is necessary when selecting one private contractor among many. It does not authorize sole-source contracting.[55]

The Path Ahead

Army organizations facing a conversion decision may choose to use the Section 8014 preference. They can convert one or more functions from performance by government employees to performance by a contractor that meets the Section 8014 criteria, without doing an MEO analysis, and without doing a cost comparison. That can be desirable, since it could save time and money, and may be less disruptive to the mission. Army installations considering use of the Section 8014 preference should, however, be aware of the pitfalls.

As previously noted, use of the Section 8014 preference does not avoid the need to comply with the law of competition. In full and open competition, though, all responsible sources are permitted to make offers, which could attract all kinds of firms, including those not at least fifty-one percent owned by Native-American Indian tribes, or Native-Hawaiian organizations. It is possible, perhaps even likely, that another kind of firm could or would win a full and open competition. So, is it possible to limit competition to Indian-owned or Native-Hawaiian-owned firms so we can use the Section 8014 preference confidently?

The answer is yes, by award to a contractor that qualifies under the "8(a) program."[56] This program allows the Small Business Administration (SBA) to assist some minority-owned firms, known as small disadvantaged businesses, by sending government work their way. To qualify as a disadvantaged business, the firm must be at least fifty-one percent owned and controlled by persons both socially and economically disadvantaged.[57] To qualify as socially disadvantaged, a person must be a member of a group that has been subjected to racial or ethnic prejudice or cultural bias.[58] There is a rebuttable presumption that American Indians and Native Hawaiians are socially disadvantaged.[59]

Generally, if an activity decides that an 8(a) contract is appropriate for a particular need, it contacts the SBA. The activity may choose the 8(a) firm, the SBA may offer one, or there may be a competition among eligible 8(a) firms. Thus, if the requiring activity arranges with the SBA to obtain an 8(a) firm with at least fifty-one percent ownership by members of Indian tribes or Native-Hawaiian organizations, the requiring activity can select that firm without violating the law of competition, since the activity can legally exclude sources other than the small disadvantaged business.[60] In addition, use of this well-established method of contracting will probably make the conversion less subject to potential constitutional challenge.

The Assistant Chief of Staff for Installation Management, Department of the Army, has specifically endorsed use of the Section 8014 preference with award to an 8(a) firm as a matter of policy.[61] Army leaders should, however, consider the practical drawbacks of using this policy.

One drawback is that it may not produce optimal results from a cost standpoint. One reason that the law prefers compe-

53. *Id.*

54. 10 U.S.C. § 2461.

55. For Section 8014 to be an exception to the requirement for full and open competition, it would need to exempt specifically direct conversions from 10 U.S.C. § 2304(j) (the Competition in Contracting Act requirement for full and open competition). *See* FAR, *supra* note 49, § 6.302-5(c).

56. This program is named after Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000).

57. 13 C.F.R. §§ 124.102-.109 (LEXIS 2002).

58. *Id.* § 124.103(a).

59. *Id.* § 124.103(b).

60. 10 U.S.C. § 2304(b)(2) (2000); FAR, *supra* note 49, § 6.204.

61. *See* Memorandum, DAIM-CS, subject: Army Interim Guidance on Conducting Commercial Activities Studies encl. 3 (6 Sept. 2000) (on file with author).

> [W]hen used in conjunction with the Small Business Administration (SBA) 8(a) Business Development Program, Section 8014 allows the Army to directly convert in-house activities, regardless of size, to performance by Indian Tribe Owned firms (as defined in 25 U.S.C [§] 450b(e)) and Native Hawaiian Organizations (as defined in 15 U.S.C. [§] 637(a)(15)) that participate in the 8(a) program . . . Effective 1 October 2000, commanders may convert in-house activities of any size to contract performance without a cost competition study if the contract is awarded to an eligible 8(a) firm with at least 51% Indian Tribe ownership or Native Hawaiian Organization at a fair market price, even if the conversion results in adverse employee actions.

Id.

tition is that competition tends to produce lower costs and higher quality goods or services. The Section 8014 preference eliminates competition between the MEO and the private contractor. Furthermore, depending on the method used to select the 8(a) firm to perform the function, there may be no competition in the selection of that contractor. The end result could be higher costs and prices over the long run, which may defeat the entire purpose of the competitive-sourcing process.

Other drawbacks to this approach is that it may be harmful to employee morale, and it may increase controversy. Government employees and their unions frequently complain (in litigation and to their senators and congressmen) that they are not being treated fairly in the competitive-sourcing process. Use of the Section 8014 preference deprives them of an opportunity to compete for the work as members of a governmental organization. Some may regard that as fundamentally unfair.

Conclusion

The Section 8014 preference has so far survived constitutional challenge from government-employee unions and individual government employees.[62] While there are some potential drawbacks, as noted above, a direct conversion using Section 8014(3) is a useful tool for Army leaders to use in appropriate circumstances. When combined with the 8(a) program, Section 8014 can provide a relatively fast and efficient way to contract out commercial activities in this era of budgetary constraints.

62. American Fed'n of Gov't Employees, 195 F. Supp. 2d 4 (D.D.C. 2002).